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BRIEF FOR RESPONDENTS, MEMBERS, BOARD OF ELECTIONS, IN OPPOSITION

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1494

JULIUS W. HOBSON, TINA C. HOBSON, THE DC STATEHOOD PARTY, CHARLES I. CASSELL, REV. JOE L. GIPSON, WARREN MORSE, BETTIE RANDALL, REV. WILLIAM WENDT, SAMMIE A. ABBOTT, DR. DAVID A. DABNEY, ETTA HORN, LORENZO J. NEAL, AND WILLIAM SCHEIRER, *Petitioners,*

v.

BOARD OF ELECTIONS OF THE DISTRICT OF COLUMBIA, J. E. BINDEMAN, ROBERT E. MARTIN, CHARLES B. FISHER, CIVIL SERVICE COMMISSION, ROBERT E. HAMPTON, JAMES E. JOHNSON, AND L. J. ANDOLSEK, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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IN THE

Supreme Court of the United States

October Term, 1970

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BOARD OF ELECTIONS OF THE DISTRICT OF COLUMBIA, J. E. BINDEMAN, ROBERT E. MARTIN, CHARLES B. FISHER, CIVIL SERVICE COMMISSION, ROBERT E. HAMPTON, JAMES E. JOHNSON, AND L. J. ANDOLSEK, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR RESPONDENTS, MEMBERS, BOARD OF ELECTIONS, IN OPPOSITION

COUNTER-STATEMENT OF QUESTIONS PRESENTED

1. Whether this Court should discretionarily decline to consider the merits of a certiorari petition seeking review of an interlocutory judgment of the United States Court of Appeals for the District of Columbia Circuit affirming in part the order of the District Court, on the basis that some of the tendered constitutional issues are not sufficiently substantial to warrant the convention of a three-judge court, and reversing in part the order of the District Court and

remanding the case with directions to consider whether the remaining constitutional questions are sufficiently ripe to warrant resolution by a three-judge court.

2. Whether District of Columbia residents are constitutionally entitled to a congressional representative with full voting rights.

3. Whether the provisions of the District of Columbia Election Act, which condition a party's eligibility to hold a primary election (in connection with the office of Delegate to Congress) on the obtaining by that party's candidate of at least 7500 votes in a previous election, create an invidious discrimination against a party whose candidate has not previously obtained such number of votes.

4. Whether the provisions of the District of Columbia Election Act, which condition an independent candidate's eligibility to run for the office of Delegate to Congress upon the securing of 2% of the signatures of the registered voters, create an invidious discrimination in favor of the candidates of major parties who are required to obtain the signatures of 2000 of their fellow party members in order to compete for the party's nomination in a primary election.

5. Whether the provisions of the Hatch Political Activities Act which preclude government employees from circulating nominating petitions and soliciting voter signatures combine with the signature requirements of the Election Act to create an invidious discrimination in favor of established party candidates against new party candidates and, as such, a denial of equal protection of the law.

COUNTER-STATEMENT OF THE CASE

Petitioner D. C. Statehood Party is a political entity seeking the admission of the District of Columbia as a constituent state of the union and petitioner Julius Hobson is the party's candidate for the office of Delegate to Congress from the District of Columbia. Other petitioners are members of the Democratic and Republican parties who

had announced their candidacies for the office of the Delegate to Congress, officers and members of the Statehood Party, federal and District of Columbia Government employees, and various District of Columbia and Maryland voters. (Amended complaint, J. A. 3-6.) The Delegate election was held on March 23, 1971.

In a class action filed prior to that election, petitioners challenged the constitutionality of various provisions contained in Acts of Congress governing elections in the District of Columbia, namely, the District of Columbia Delegate Act, P. L. 91-405 (hereinafter "the Delegate Act"); the District of Columbia Election Act of 1955, as amended §§ 1-1101 through 1-1114, D. C. Code, 1967, as amended by P. L. 91-405 (hereinafter "the Election Act"); and the Hatch Political Activities Act, P. L. 89-554, 5 U. S. C. A. §§ 7321 through 7327 (hereinafter "the Hatch Act") (Id., J. A. 3). Named as defendants were the members of the Board of Elections for the District of Columbia (hereinafter "the Board"), and the members of the United States Civil Service Commission (Id., J. A. 6).

In their amended complaint, petitioners allege that the Delegate Act is unconstitutional to the extent that it deprives them of a delegate in Congress with full voting rights. Petitioners additionally claim that they are constitutionally entitled to vote in a referendum on the question of statehood for the District of Columbia, and that the Board has refused to place this question on the ballot "at the next general election." (Id., J. A. 7-8.)

Petitioners assert that the Election Act discriminates against the D. C. Statehood Party in favor of the Democratic and Republican parties in setting forth the quantitative voter support requirement which must be met in order to conduct primary elections for the office of delegate (Id., J. A. 8). In addition, petitioners claim that the Election Act works an unjust discrimination against the D. C. Statehood Party *vis a vis* the Democratic and Republican

parties in requiring the Statehood Party to submit petitions containing an excessive number of voter signatures in order to directly nominate candidates for the office of delegate (Id., J. A. 8-9). Petitioners also assert in effect that the Election Act discriminates against the D. C. Statehood Party in favor of the Democratic and Republican parties in limiting the right to nominate candidates for presidential electors to those parties who have had their candidates elected as President of the United States after January 1, 1950, and by requiring that other parties obtain signatures of 5% of the registered voters in order to have the names of their candidates for the presidency placed on a general election ballot (Id., J. A. 8).

Petitioners go on to allege that the supposed discriminatory advantage created in favor of major parties by the Election Act is unconstitutionally enhanced by the Hatch Act's prohibition of political campaigning involving circulation of nominating petitions and solicitation of voter signatures by governmentally employed local residents (Id., J. A. 10).

Although petitioners do not claim inability to pay filing fees because of poverty, they nonetheless assert that the filing fee requirement of the Election Act "discriminates against the poor" and also imposes an unreasonable burden on non-indigent candidates for delegate (Id., J. A. 9). Finally, petitioners urge that the Hatch Act is unconstitutional to the extent that government employees are precluded from circulating nominating petitions and soliciting voter signatures in behalf of those seeking the office of Delegate to Congress (Id., J. A. 9-10).

On the basis of these allegations, petitioners sought the convention of a three-judge court for the purpose of enjoining the enforcement of the Delegate Act to the extent that it withholds from local residents a delegate to Congress with full voting rights. Petitioners also sought to en-

join enforcement of the challenged provisions of the Election Act and the Hatch Act. The District Court refused to convene a three-judge court and dismissed petitioners' complaint.

On appeal, the United States Court of Appeals for the District of Columbia Circuit, on March 11, 1971, held that:

> " * * * the judgment appealed from, insofar as it relates to (a) the nonvoting status of the officer provided by the District of Columbia Delegate Act and (b) the various statutory provisions bearing upon the manner of his selection, is affirmed by reason of the insubstantiality of the questions raised. * * * [Citations] The court is also of the view that, with respect to the challenge to the filing fee requirements, the allegations of the complaint do not present any live controversy appropriate for judicial resolution * * *."

The court reversed the judgment below to the extent that it involved a declaration of insubstantiality with respect to petitioners' challenge to the statutory criteria which nonestablished parties are required to meet in order to participate in presidential elections, stating that:

> " * * * insofar as the judgment appealed from involves the challenge by appellants to the party qualifying provisions for the Presidential election contained in Section 8(f) of the District of Columbia Election Act, it is vacated and the case remanded to the District Court for hearing and determination of the preliminary question of whether the constitutional issues are sufficiently ripe for resolution at this time at the instance of these appellants as to warrant the convening of a three-judge court. * * * [Citations] We intimate no opinion as to the merits of those issues."

This petition followed.

ARGUMENT

I

The interlocutory nature of the judgment of the Circuit Court of Appeals when viewed in combination with other circumstances will justify this Court's refusal to consider the merits of the petition.

The Circuit Court of Appeals partially affirmed the order of the District Court on the basis that some of the tendered constitutional issues are not sufficiently substantial to warrant the convention of a three-judge court. The court went on to partially reverse the same order and to remand the case to the District Court with directions to consider whether the remaining constitutional questions are sufficiently ripe to warrant convention of a three-judge court. The judgment of the Circuit Court of Appeals therefore lacks finality. While finality may not be an essential prerequisite to the exercise of this Court's certiorari jurisdiction over cases in circuit courts of appeals under 28 U. S. C. A. § 1254 (cf. *City of El Paso* v. *Simmons,* 379 U. S. 497, 501-503 (1965)), a lack of finality in an appropriate case certainly provides justification for this Court's discretionary refusal to invoke its certiorari jurisdiction under that statute. Cf. *Land* v. *Dollar,* 330 U. S. 731, 734 (1947). Such justification exists here.

As previously pointed out, this case involves multiple constitutional issues. In *Republic National Gas Co.* v. *Oklahoma,* 334 U. S. 62 (1948), this Court enunciated the salutary policy that fragmentary and piecemeal judicial review is to be avoided in cases involving issues of such a nature, stating:

> " * * * But for the soundest of reasons we ought not to pass on constitutional issues before they have reached a definitive stop. * * *"

Moreover, quite unlike a judgment of a circuit court of appeals with nationwide impact, this case involves the construction of locally applicable election statutes passed by Congress legislating for the District of Columbia in the same manner that a state legislature acts with respect to the state and its subdivisions. See *Atlantic Cleaners & Dyers* v. *United States,* 286 U. S. 427, 434-435 (1932). Compare *Slaker* v. *O'Conner,* 278 U. S. 188 (1929); *South Carolina Electric & Gas Co.* v. *Flemming,* 351 U. S. 901 (1956). Cf. also 28 U. S. C. A. § 1257.

Finally, petitioners will not be seriously inconvenienced should this Court discretionarily defer consideration of a petition for a writ of certiorari in this case until *all* constitutional questions involved have reached a definitive stop. The Delegate to Congress election with which many of petitioners' constitutional challenges are concerned (see Argument II, herein) took place on March 23, 1971. Petitioner Hobson, after obtaining the requisite number of voter signatures and paying the filing fee pursuant to P. L. 91-405, § 203(j), (l), participated in that election as the D. C. Statehood Party's candidate. Because he polled in excess of 7500 votes, the Statehood Party, pursuant to P. L. 91-405, § 203(h), is eligible to conduct a political primary in connection with the 1972 delegate election. Compare *Golden* v. *Zwickler,* 394 U. S. 103 (1969), with *Moore* v. *Ogilvie,* 394 U. S. 814 (1969).

Respondents submit that the totality of these factors amply justifies a refusal by this Court to grant the petition for a writ of certiorari.

II

Petitioners fail to present questions of sufficient importance to warrant the invocation of this Court's certiorari jurisdiction.

A

District of Columbia residents are not constitutionally entitled to a representative in Congress with full voting privileges.

On the basis of controlling decisions of this Court (hereinafter discussed), the Circuit Court of Appeals rejected as wholly insubstantial petitioners' claim that the Delegate Act unconstitutionally denies them the right to a representative in Congress with all the powers of the representatives from the several states, including the right to vote. In requesting this Court to invoke its ceritiorari jurisdiction to review such a ruling, petitioners overlook the important circumstance that the District's representation in Congress does not derive from Article I, Section 2 of the Constitution which vests legislative power in the representatives of the several states (cf. petition at 9-10).[1] Instead, any political right enjoyed by local residents stems from Article I, Section 8, Clause 17, which provides in pertinent part that:

> "Congress shall have Power * * * *To exercise exclusive Legislation in all Cases whatsoever, over such District* (not exceeding ten Miles Square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States * * *." (Emphasis added.)

This Court has construed Article I, Section 8, Clause 17, to mean that, with respect to the District, Congress possesses the combined powers of both a general and a local government, and that such powers are plenary and unqualified. *O'Donoghue* v. *United States,* 289 U. S. 516

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[1] The existence of a non-voting delegate in Congress is by no means a novelty, as this kind of limited congressional representation has been in existence for many years. See *In re Lane,* 133 U. S. 433, 447 (1870); *Kopel* v. *Bingham,* 211 U. S. 468, 475-476 (1909).

(1933); *Atlantic Cleaners & Dyers* v. *United States,* 286 U. S. 427 (1932).

In *Kendall* v. *United States,* 37 U. S. (12 Pet.) 524, 619 (1838), this Court stated that "Congress has the entire control over the district, for every purpose of government * * *." Later, in *Shoemaker* v. *United States,* 147 U. S. 282, 300 (1893), this Court noted that Congress has " * * * full and unlimited jurisdiction, both of a political and municipal nature, over the District of Columbia * * *."

In *Loughborough* v. *Blake,* 18 U. S. (5 Wheat.) 317, 324 (1820), which involved the imposition by Congress of a tax on District residents notwithstanding their lack of representation in Congress, this Court, through Chief Justice Marshall, stated that persons choosing to reside in the District of Columbia have "voluntarily relinquished the right of representation, and * * * adopted the whole body of congress for * * * [their] legitimate government * * *." The taxation without representation principle was reaffirmed in *Heald* v. *District of Columbia,* 259 U. S. 114, 124 (1922), and recently reapplied in *Breakfield* v. *District of Columbia,* —— U. S. App. D. C. ——, —— F. 2d —— (No. 23, 456, decided August 7, 1970), cert. denied No. 940, February 22, 1971. It is inconceivable that such an unbroken line of decisions would have emerged without an express judicial recognition that District residents were constitutionally entitled to voting representation in Congress if, in fact, they have such a right.

Moreover, as is clear from the Constitution itself, an amendment of that instrument was required (i.e., Amendment 23) to permit District residents to vote in presidential elections. While the Report of the Senate District Committee on the Delegate Act expresses the desirability of a similar constitutional amendment in order to accord District residents congressional voting representation, Congress, in the meantime, has chosen to exercise its legislative power over the District to permit a non-voting delegate to

maintain continuing contact with it so that the needs of local residents may be better satisfied. Senate Report No. 91-1122, 90th Cong., 2nd Sess., at 2 and 3. Any attempt by Congress, in the absence of a constitutional amendment, to confer upon such a delegate the right to vote on national and local matters, would manifestly constitute a constitutionally impermissible delegation of legislative power. See *Schecter Poultry Corp.* v. *United States,* 295 U.S. 495, 529 (1935).

Petitioners' contention that the Board must conduct a referendum for the benefit of all local residents on the question of statehood for the District is based on their belief that Article IV, Section 3, of the Constitution (rather than a statute) requires such a referendum (petition at 21). As already pointed out, however, the controlling constitutional provision in this case is Article I, Section 8, Clause 17, which vests in Congress exclusive legislative power over the District of Columbia. It may well be that "two-thirds of both Houses" of Congress may "deem it necessary" to propose an amendment to the Constitution on the question of statehood pursuant to Article V of the Constitution and conceivably then authorize the Board to conduct a local referendum on the question of statehood. But plainly the Constitution, as presently written, does not compel the Board to do so.

B

The provisions of the Election Act do not unconstitutionally discriminate in favor of candidates of major political parties.

Petitioners also request this Court to review the question of whether certain provisions of the Election Act amount to unjust discriminations in favor of candidates of major political parties who seek the office of Delegate to Congress. They assert that the Election Act discriminates against entities such as the D. C. Statehood Party in limiting the right to conduct primary elections for the office of delegate

to parties obtaining at least 7500 votes in the preceding delegate or presidential election. P. L. 91-405, § 203(h). They go on to characterize as an unconstitutional discrimination the Election Act's requirement that an independent candidate for the office of delegate furnish signatures of 2% of the registered voters (5000 signatures) in order to run in the general election, whereas a candidate for a major party need only furnish 2000 signatures from party members in order to enter that party's primary. P. L. 91-405, §§ 203(i), (j) and (l). In this regard, petitioners rely on *Williams* v. *Rhodes*, 393 U. S. 28 (1968).

Williams involved a challenge to Ohio election laws which, in the language of this Court, made it "virtually impossible" for a third party to obtain a position on the presidential ballot. (393 U.S. at 24 and 25.) The applicable statute required such a party to submit a petition signed by 15% of those persons voting in the last preceding gubernatorial election, and went on to impose numerous other onerous requirements in the event that the requisite number of signatures was obtained. See concurring opinion of Mr. Justice Douglas, 393 U.S. at 36-37. As this Court made clear, the 15% signature requirement, standing alone, did not constitute an invidious discrimination, but combined with various other discriminatory features to do so. This Court thus observed (393 U.S. at 34) that:

> " * * * [*T*]*he totality of the Ohio restrictive laws taken as a whole imposes a burden on voting and associational rights* which we hold is an invidious discrimination, in violation of the Equal Protection Clause." (Emphasis added.)

Cf. concurring opinion of Mr. Justice Douglas, id. at 39; dissenting opinion of Mr. Justice Stewart, id. at 55; and dissenting opinion of Mr. Justice White, id. at 62. This Court also stated that "minor" differences in the application of election laws to different groups are constitutionally

permissible, and that, in the absence of a statutory scheme setting forth a severe combination of restrictions on new party candidates, a legislative body has "broad powers to regulate voting, which may include laws relating to the qualification and functions of electors." Id. at 34. Specifically, this Court recognized that "the State does have an interest in attempting to see that the election winner be the choice of the majority of its voters" (Id. at 32), and that "the existence of multitudinous fragmentary groups might justify some regulatory control" (Id. at 33).

Against this background, respondents submit that the instant case unmistakably involves nothing more than "minor" differences in the application of election laws to different groups. The case, thus viewed, provides no logical basis for granting the petition on the basis of *Williams* v. *Rhodes*. See *Lyons* v. *Davoren*, 402 F. 2d 890 (1st Cir., 1968), cert. denied, 393 U. S. 1081 (1969).

C

The Hatch Act creates no discriminatory advantage in favor of candidates of major political parties for the office of Delegate to Congress.

The circumstance that at least half of the local working population is governmentally employed and thus precluded by the Hatch Act (5 U. S. C. A. §§ 7321 through 7327) from circulating nominating petitions and soliciting voter signatures does not give rise to a "discrimination" peculiarly applicable to the governmentally employed members of major parties to the exclusion of similarly situated members of other parties for the purpose of application of the doctrine of *Williams* v. *Rhodes*. Instead, the Hatch Act's campaign activity prohibitions apply across the board to all governmentally employed individuals irrespective of party and, as such, work no discriminatory advantage to one political party with a corresponding detriment to another. Conse-

quently, the Hatch Act restrictions of which petitioners complain create at best a kind of "accidential inequality", consistently held not to constitute a denial of equal protection. See *First National Bank* v. *Albright*, 208 U.S. 548, 552 (1908); *Phelps* v. *Board of Education*, 300 U.S. 319, 324 (1937); *Great Atlantic and Pacific Tea Co.* v. *Grosjean*, 301 U.S. 412, 424 (1937); *Martin* v. *Walton*, 368 U.S. 25 (1961). This circumstance hardly creates the type of substantial question customarily reviewed by this Court through certiorari.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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